(9)

No. 93-1121

In the Supreme Court of the United States

OCTOBER TERM, 1994

ED PLAUT, ET AL., PETITIONERS

v.

SPENDTHRIFT FARM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court's grant of certiorari is limited to the following question:

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1, to the extent that it requires reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 1 F.3d 1487. The opinion of the district court (Pet. App. 31a-39a) is reported at 789 F. Supp. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1993. The petitions for rehearing were denied on October 14, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 11, 1994, and was granted on June 6, 1994.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), is reproduced at App., *infra*, 1a.

STATEMENT

1. In November 1987, petitioners filed a private securities fraud action in the United States District Court for the Eastern District of Kentucky. The complaint alleged claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1988) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.-10b-5, as well as pendent state law claims. Pet. App. 31a-32a.

When the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Sixth Circuit, like most other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *Carothers* v. *Rice*, 633 F.2d 7, 8-9 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981).

On June 20, 1991, while petitioners' action was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* held that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under Section 9(e), a suit may not

be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. Having adopted that new limitations period for Section 10(b) actions, the Court applied the rule to the parties in *Lampf* itself. See *id.* at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

On the same day that *Lampf* was decided, this Court also issued its decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). Under *Beam*, if the Court in a civil case applies a new interpretation of the law in the decision that announces it, courts must apply that interpretation of law to all other pending cases, even if the change in interpretation was not foreseeable and the parties had reasonably relied on prior judicial interpretations. The effect of *Beam* was to make *Lampf*'s view of the governing limitations period applicable to all pending Section 10(b) actions, whether or not the plaintiffs in those cases had relied on settled precedents establishing longer limitations periods. In August 1991, relying on *Lampf* and *Beam*, the district court dismissed petitioners' federal securities claims as time-barred and entered final judgment against petitioners. Petitioners did not appeal the judgment,[1] and the time for appeal expired in September 1991. Pet. App. 5a, 32a.

2. In December 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange

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[1] As the court of appeals noted, petitioners "did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal." Pet. App. 5a.

Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A represents Congress's decision to protect victims of federal securities fraud who filed suit within the limitations periods set by pre-*Lampf* precedents, but whose suits were retroactively rendered untimely by the Court's decisions in *Lampf* and *Beam*.

Section 27A applies to private Section 10(b) actions that were commenced before June 20, 1991, the date that *Lampf* and *Beam* were decided. With respect to such actions, Section 27A(a) provides that the limitations period "shall be the * * * period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991," the day before *Lampf* was decided. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). In jurisdictions (such as the Sixth Circuit) that applied a longer limitations period before *Lampf*, Section 27A has the effect of changing the governing law by substituting the longer limitations period for the "1-and-3" period that *Lampf* borrowed from Section 9(e) of the Exchange Act.

When Section 27A became law, many of the actions that were rendered untimely under *Lampf* were still pending in the federal system, either in the district courts or on appeal. Those pending cases are addressed by Section 27A(a), which is not at issue in this case.[2] Some suits, however, had been dismissed

[2] The courts of appeals have uniformly sustained the constitutionality of Section 27A(a). See *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993).

on the basis of *Lampf* and had not been appealed within the 30-day time limit imposed by Congress on private civil appeals. See 28 U.S.C. 2107 (1988 & Supp. IV 1992). To account for such cases, Congress enacted Section 27A(b), the provision at issue here.[3]

Section 27A(b) provides a mechanism for the reinstatement of actions that had been "dismissed as time barred" following this Court's decision in *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). During a 60-day period beginning on December 19, 1991, the date of Section 27A's enactment, plaintiffs whose suits had been the subject of such dismissals could file motions seeking reinstatement. A district court presented with a reinstatement motion under Section 27A(b) must consider the timeliness of the suit by applying "the limitation period provided by the laws applicable in the jurisdiction" before *Lampf*. 15

[3] Before enacting Section 27A, Congress obtained a memorandum from the American Law Division of the Congressional Research Service (CRS) regarding the constitutional issues raised by the bill that became Section 27A. See CRS *Memorandum* (Sept. 26, 1991), *reprinted in Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 374-379 (1991). The CRS memorandum concluded that the bill would survive review under the "rational basis test" and that the bill's effect on "final judicial orders" would not violate the separation of powers doctrine, "the controlling consideration appearing to be whether the congressional enactment is 'outcome determinative.'" CRS *Memorandum*, at 6.

U.S.C. 78aa-1(b) (Supp. IV 1992). If the court determines that the suit is timely under that limitations period, the court is required to reinstate the acion; if the court determines that the suit remains untimely, the motion for reinstatement is denied.

3. In February 1992, within the prescribed 60-day period, petitioners moved to reinstate their claims under Section 27A(b). In April 1992, the district court denied the reinstatement motion. The court acknowledged that petitioners satisfied the statutory requirements for reinstatement under subsection (b), but held that subsection (b) violates the Constitution's separation of powers and the Due Process Clause of the Fifth Amendment. Pet. App. 33a-39a.

Petitioners appealed from the denial of their reinstatement motion, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of subsection (b) of Section 27A.[4] The court of appeals affirmed. Relying on *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the court held that Section 27A(b) violates the separation of powers doctrine. Pet. App. 5a-27a. According to the court, Section 27A(b)'s reopening of final judgments of federal courts in cases involving private parties constitutes an exercise by Congress of the judicial power. Pet.

[4] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, courts are directed to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality." 28 U.S.C. 2403(a). Because the United States intervened as a party in the court of appeals in this case, it is a respondent in this Court. Sup. Ct. R. 12.4. The government is submitting this brief as a respondent in support of petitioners' position, pursuant to the Rules of this Court. *Ibid.*

App. 13a-14a, 27a. The court did not address the constitutionality of subsection (b) under the Due Process Clause. Pet. App. 14a n.12.

SUMMARY OF ARGUMENT

I. Section 27A(b) of the Securities Exchange Act of 1934 does not violate the separation of powers doctrine. While it has long been established that the decisions of Article III courts are not subject to review and reversal by another branch, and that Article III courts may not be assigned the nonjudicial function of making advisory recommendations to other Branches, Section 27A(b) infringes neither of those constitutional concerns. Section 27A(b) does not place the Legislative or Executive Branch in the role of reviewing the merits of the decisions of federal courts, and it does not reverse the holdings of federal courts. Nor does Section 27A(b) convert judicial decisions into nonbinding recommendations or advisory opinions.

In Section 27A(b), Congress legislated a new statute of limitations for the class of securities fraud cases that had been dismissed in light of this Court's adoption of a new (and in many cases shorter) federal limitations period for implied Section 10(b) claims. Congress also provided a procedural vehicle for reinstating dismissed cases in order for the new law to be applied by the courts. Congress's actions were an exercise of legislative, not judicial, power. And, under Section 27A(b), courts have only judicial functions to perform: the application of law to fact in particular cases and the rendering of judgments on the merits.

Nothing in Section 27A(b) undermines the institutional mission of the Article III courts to determine

facts and to interpret and apply the governing law in particular cases. Nor does the reopening of the class of judgments covered by Section 27A(b) constitute a threat to judicial independence. Procedurally, Section 27A(b) is analogous to Fed. R. Civ. P. 60(b). Substantively, the provision is no different in effect than the creation of a new federal cause of action with a longer statute of limitations. Neither history nor this Court's decisions cast doubt on the validity of legislation of that character. In sum, Section 27A(b) respects the division between legislative and judicial functions that the Constitution requires.

II. Section 27A(b) does not violate the Due Process Clause. Under this Court's jurisprudence, economic legislation that impinges on property interests is constitutional if it has a rational basis and serves a legitimate government interest. The notion that "vested rights" in a judicial judgment are immune to government regulation finds no support in modern cases, which recognize that Congress may affect property interests through retroactive, as well as prospective, legislation. The Court has specifically rejected the claim that rights represented by a judgment, alone of all property rights, are exempt from rational regulation. Here, Section 27A(b) is justified because it is a reasonable measure to protect the interests of victims of securities fraud whose cases retroactively became untimely.

Even if Section 27A(b) were analyzed under older decisions describing a "vested rights" doctrine, however, the provision is constitutional. If there were any special protection for judgments under those cases, a judgment such as the one here, which represents a finding only that a now-superseded limitations period had run, would be the least worthy of constitutional protection. In any event, this Court's vested rights cases have always acknowledged that a legislature may provide for further judicial review of a judgment, even after the time for appeal has run. And those cases further hold that it does not violate due process for the legislature to provide new substantive rules of decision for application in the new review proceedings. Those cases establish that the concept of "vested rights" does not invalidate provisions, like Section 27A(b), that provide for further review of a claim, notwithstanding a prior judgment, in light of new substantive law.

ARGUMENT

SECTION 27A(b) OF THE SECURITIES EXCHANGE ACT OF 1934 IS CONSTITUTIONAL

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION OF POWERS UNDER THE CONSTITUTION

Section 27A(b) provides a mechanism for reinstatement of a limited class of securities fraud cases based on an application of a change in the governing statute of limitations; it does not adjudicate the timeliness of those actions under the revised law, and it does not dictate the ultimate judgments to be rendered. Nevertheless, relying on principles announced in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the court of appeals concluded that Section 27A(b) crosses the constitutional line that separates the legislative power under Article I from the judicial power under Article III. Section 27A(b), however, does not raise the constitutional concerns considered in *Hayburn's Case*. Section 27A(b) neither involves an attempted exercise of the judicial power by another

Branch of the government, nor requires the federal courts to exercise the non-judicial function of rendering a decision subject to review in another Branch. Nor does Section 27A(b) violate general separation of powers principles, or the historical understanding of Article III's purposes.

A. Section 27A(b) Is Consistent With The Principles Of *Hayburn's Case*

The basic separation of powers principles invoked by the court of appeals trace their source to *Hayburn's Case.* The constitutional concerns expressed in *Hayburn's Case,* however, do not apply to Section 27A(b).

1. *Hayburn's Case* involved the administration of a pension statute for disabled Revolutionary War veterans. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. Under that statute, the circuit courts created by the Judiciary Act of 1789 were directed to examine pension applicants to determine the nature and degree of their disability, and to "transmit the result of their inquiry" to the Secretary of War, if "in their opinion, the applicant should be put on the pension list." § 2, 1 Stat. 244. The Secretary of War, in turn, was authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress," in any case in which he had "cause to suspect imposition or mistake." § 4, 1 Stat. 244. The statute thus subjected a circuit court's ruling that an applicant should be put on the pension list to revision and reversal by the Secretary of War.

Hayburn's Case itself became moot before this Court had occasion to address the constitutionality of the pension statute. See 2 U.S. (2 Dall.) at 409-410; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (repeal-

ing challenged provision). Five of the six Justices of this Court, however, expressed their views on the statute in their capacity as circuit judges.[5] Those views, which are collected in the report of *Hayburn's Case,* 2 U.S. (2 Dall.) at 410-414, "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison* v. *Olson,* 487 U.S. 654, 677 n.15 (1988).

All of the Justices who considered the statute stated that the Constitution did not authorize review and revision of the judgments of federal courts by the Executive or Legislative Branch. Chief Justice Jay and Justice Cushing stated that "by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. (2 Dall.) at 410. Justices Wilson and Blair likewise concluded that the "revision and controul" of judicial judgments by the Executive and Legislative Branches conflicted "with the independence of that judicial power which is vested in the courts." *Id.* at 411. And Justice Iredell concluded that "no decision of any court of the United States can, under any circumstances * * * agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments." *Id.* at 413.

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[5] Circuit courts for the districts of New York, Pennsylvania, and North Carolina addressed the validity of the law, and each panel wrote letters to the President to express its views. See Maeva Marcus and Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent,* 1988 Wis. L. Rev. 527, 529-534.

The opinions in *Hayburn's Case* reflect two related Article III concerns. First, because the Constitution vests "the judicial Power" exclusively in the federal courts, neither the Executive Branch nor Congress may act as a "court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, by reviewing the judgments of Article III courts. Second, Article III precludes the federal courts themselves from carrying out "any duties, but such as are properly judicial * * *." *Ibid.* Because "the judicial Power" reposed in the courts by Article III, § 1, contemplates the authority to find facts and determine the rights of the parties under the law, a statute like the one in *Hayburn's Case*, which called on Article III courts to make nonbinding recommendations, requires the courts to play a role that "is not judicial." [6] *Hayburn's Case*, 2 U.S. (2 Dall.) at 410.

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[6] In *Hayburn's Case*, Chief Justice Jay and Justice Cushing construed the statute as an invitation to federal judges to "execute this act in the capacity of commissioners," 2 U.S. (2 Dall.) at 410, on the theory that individual members of the federal judiciary may carry out non-Article III responsibilities by accepting appointment to nonjudicial offices. The other Justices declined to exercise the jurisdiction conferred by the statute, *id.* at 411-414, and Chief Justice Jay and Justice Cushing later concluded that the statute did not authorize them to act as commissioners. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-50, 52-53 (1851) (discussing *Hayburn's Case* and the Court's subsequent consideration of the same statute in the unreported decision of *United States* v. *Yale Todd* (1794)). While inviting or requiring Article III judges to serve as commissioners might raise the question whether such an assignment is consistent with Article III, cf. *Mistretta* v. *United States*, 488 U.S. 361, 402-404 (1989), that issue was not examined in *Hayburn's Case* and is not involved here.

2. The principles of independent judicial decisionmaking voiced in *Hayburn's Case* are not threatened by Section 27A(b). Section 27A(b) neither places another Branch as a "court of errors" in review of decisions rendered by Article III courts, nor requires federal courts to carry out functions that are not "judicial" in character.

a. Section 27A(b) does not constitute an exercise by Congress of the "judicial Power" conferred on the Article III courts. In enacting Section 27A(b), Congress did not "sit as a court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, to review the validity of judicial judgments under existing rules of decision. Instead, Congress exercised its "legislative Powers" by passing a law, in response to *Lampf*, that prescribes a new rule of decision to be applied by the courts. See *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992); see also *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 (1994) ("Congress may * * * decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision."). Section 27A(b) changes the limitations periods for pre-*Lampf* Section 10(b) cases, see *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 113 S. Ct. 2085, 2089 (1993); provides a vehicle for application of that law to dismissed cases; and leaves to the courts the judicial functions of finding facts in particular cases, applying the new limitations periods to those facts, and, in cases that are found timely, to adjudicate the merits of the controversy. The provision thus preserves for the courts "[t]he essence of judicial decisionmaking—applying general

rules to particular situations[.]" *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. at 1519.

Section 27A(b) is fundamentally different from the pension statute in *Hayburn's Case*. That law prescribed the legal standards to be applied by the courts regarding eligibility for military pensions, but authorized the Secretary of War to overturn the decisions of federal courts on a case-by-case basis if the Secretary had cause "to suspect imposition or mistake" in the court's determinations under existing law. Executive review of judicial action in particular cases involves impermissible oversight of the decisions of the courts. Section 27A(b), in contrast, does not involve any oversight of the way in which courts have applied law to fact in particular cases. The prior judgments are to be reopened because the law has changed and courts applying the new law have found the conditions for reopening satisfied, not because Congress determined in individual cases that the courts had applied prior law incorrectly.[7]

It would be one thing if Congress enacted a self-executing statute that purported to set aside the judgment of a court. Section 27A(b), however, does

[7] The court of appeals therefore erred in stating that "[i]f the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*," because "[i]n enacting § 27A, Congress has not simply reserved such power [to sit as a 'court of errors'], as in *Hayburn's Case*, but actually exercised it." Pet. App. 13a-14a. Section 27A(b) does not represent the exercise by Congress of powers belonging to a court of errors. Rather, Section 27A(b) provides a vehicle for courts to apply a change in the governing law that is within Congress's power to enact—a statute of limitations. To designate the class of cases that will be governed by a change in statutory law is a legislative, not a judicial, function.

not of its own force reopen any judgments. Under Section 27A(b), the plaintiff must file a motion with the court invoking the legal standards provided by Section 27A; the court then applies those standards. A remedy that requires a court, on motion of a party, to reopen a judgment in order to apply new law does not usurp the judicial power. As this Court has held, establishing a procedural avenue to have a new legal standard applied to a case is a legislative, not a "judicial," function. *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) (statute authorizing court to "reverse and annul any prior decree or adjudication" that is found to rest on forged evidence, whether or not the prior judgment was final and conclusive between the parties, "is in no respect the exercise of judicial powers"); see also *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1864) (act restoring lapsed right to Supreme Court review of territorial court decisions, after the territory became a State, was "of a remedial character, and * * * the peculiar subject[] of legislation. [It was] not liable to the imputation of being [the] assumption[] of judicial power.").[8]

b. Section 27A(b) does not require federal courts to play a role that "is not judicial." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. The task assigned to district courts by Section 27A(b) is a fundamentally judicial one—that of finding facts and applying a

[8] *Sampeyreac* and *Freeborn* involved prior judgments of territorial courts. The Court's conclusion, however, that the statutes involved in those cases did not involve exercises of judicial power by Congress, but constituted proper forms of legislation, did not turn on the nature of the tribunal that had rendered the judgments. Those holdings turned, rather, on the nature of the statutes at issue.

legal rule (the statute of limitations) to a controversy between the parties. The courts, not Congress, determine the effect of the legal rule in the circumstances of a particular case. Nothing in Section 27A(b) precludes a court from denying reinstatement in an individual case, if it determines either that "the law[] applicable in the jurisdiction" before *Lampf* provides the same limitations period adopted in *Lampf*, or that the suit was untimely even under a different limitations period. And, if the court finds the suit timely, Section 27A(b) has no effect on the way a court will resolve the merits of the securities fraud claim itself. The ultimate judgment to be rendered remains within the control of the judiciary.

Section 27A(b) does, of course, require courts to reinstate cases that have been dismissed, if they have first determined that the suits are timely under the new limitations period prescribed by Congress. But a law providing a reopening remedy is not analogous to a law requiring the courts to render nonbinding determinations, as in *Hayburn's Case*. The prior determination of the district court in this case was that the statute of limitations, as decreed by *Lampf*, barred this action. Congress has not "reviewed" that conclusion under the rule of *Lampf*, or "reversed" the district court's holding. Rather, Congress has provided a procedure for the district court to reinstate the action if the new statute of limitations is satisfied, and then to adjudicate the case on the merits. 15 U.S.C. 78aa-1(b) (Supp. IV 1992).

In concluding that the statute in *Hayburn's Case* required the courts to assume a role that "is not judicial," 2 U.S. (2 Dall.) at 410, Chief Justice Jay articulated concerns that resemble those underlying the prohibition against advisory opinions. See *Muskrat* v. *United States*, 219 U.S. 346, 352-353, 361-362 (1911). Federal courts cannot be required to give "an expression of opinion" on an issue of law, when the judgment will not affect the rights of parties. *Id.* at 362. Section 27A(b), however, does not convert the judgments rendered in the underlying Section 10(b) cases into advisory opinions. See 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3529.1, at 302, 306-307 (2d ed. 1984) (distinguishing the justiciability issues raised in cases such as *Hayburn's Case* from "cases dealing with the power of Congress to upset the results of final judicial judgments by legislation adopted *after* judgment"). Those judgments finally determined the application of prior limitations law to the cases at hand. Section 27A changes that law, and that change is the reason for reopening the judgment. A prior judgment is not rendered "advisory" in the Article III sense when a court is obligated to revise it as a consequence of legislation enacted *pendente lite*, see *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and it is not rendered "advisory" when the parties' legal rights are altered by legislation enacted after the litigation has concluded, see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855).

B. Section 27A(b) Is Consistent With Broader Separation Of Powers Principles

Section 27A(b) is also constitutional when considered in light of the broader purposes of the Constitution's separation of powers. Because Article III protects the independence of courts and the right of litigants to politically independent adjudicators, *Com-*

modity Futures Trading Commission v. *Schor*, 478 U.S. 833, 848, 850 (1986), this Court has guarded against a "provision of law [that] impermissibly threatens the institutional integrity of the Judicial Branch." *Mistretta* v. *United States*, 488 U.S. 361, 383 (1989) (citations and internal quotation marks omitted). Section 27A(b) does not threaten the independence or institutional integrity of the Judicial Branch, because it does not constitute an impermissible intrusion on the courts' power to decide cases or to enter judgments.

1. The Constitution contains a variety of restrictions that prevent Congress from engaging in adjudicatory functions assigned to the Article III courts. The prohibitions against "ex post facto Law[s]" [9] and "Bill[s] of Attainder" [10] prevent Congress from

[9] Art. I, § 9, Cl. 3. The Ex Post Facto Clause, applicable solely to criminal laws, *Calder* v. *Bull*, 3 U.S. 3 (3 Dall.) 386 (1798), protects against "arbitrary and potentially vindictive legislation," *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), which may represent "the use of the political process to punish or characterize past conduct of private citizens." *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1498 n.20 (1994). The Clause thus represents a judgment that "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers[.]" *Ibid.*

[10] Art. I, § 9, Cl. 3. The prohibition against bills of attainder bars "legislative Acts inflicting punishment." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 474 (1977). "Just as Art. III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.'" *Id.* at 469, quoting *United States* v.

"singling out disfavored persons and meting out summary punishment for past conduct." *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1497 (1994).[11] The principles of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146-147 (1872), prevent Congress, in certain contexts, from directing a decision in a pending case.[12] And Congress may not assign certain ad-

Brown, 381 U.S. 437, 445 (1965). As *Brown* recognized, the Clause is thus an aspect of the "separation of powers." 381 U.S. at 442-443.

[11] "The linking of bills of attainder and *ex post facto* laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 n.30 (1977).

[12] In *Klein*, suit was brought to recover private property sold by the United States during the Civil War. Proof that the property owner had not aided the rebellion was made by showing that he had received a Presidential pardon. Congress then enacted a law providing that the receipt of the pardon was proof of disloyalty, rather than loyalty, and that this Court was required to dismiss any appeal in a case in which the plaintiff had established his loyalty through a pardon. This Court held that the law's limitation on the Supreme Court's jurisdiction and Congress's regulation of the effect of the Presidential pardon violated the Constitution. 80 U.S. (13 Wall.) at 146-148. There is considerable question about the scope and rationale of *Klein*. See Paul M. Bator, Paul J. Mishkin, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System*, 369 & n.4 (3d ed. 1988). Even if the case were read broadly, however, as invalidating a statutory rule of decision requiring a court to decide a pending case in a particular way, but see *Robertson* v. *Seattle Audubon Society*, *supra*; *Pope* v. *United States*, 323 U.S. 1, 8-10 (1944), *Klein* would be inapplicable here. Section 27A(b) does not dictate the outcome of any particular Section 10(b) case, nor does it require courts to

judicatory functions to non-Article III decision-makers. See, *e.g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Those protections are not violated by Section 27A(b). Section 27A(b) does not single out particular persons for punishment. It does not dictate the decision on the merits of a particular case. And it does not transfer responsibility for deciding cases to another Branch of the government.

The court of appeals stated that "if Congress may by legislation reverse or vacate the final judgments of Federal courts, then Congress has rendered the whole function of the judiciary futile: whether 'the *whole* power of one department is exercised by the hands which possess the *whole* power of another department,' *Mistretta*, 488 U.S. at 381 (quoting *The Federalist* No. 47 (Madison)) is left subject only to the self-restraint of the legislature." Pet. App. 25a. Section 27A(b), however, does not usurp even part of a power that the judiciary exclusively possesses, let alone the "whole power of another department." The courts retain their fact-finding and law-application roles under Section 27A(b); Congress has simply specified the class of cases to which that law applies.

make particular findings of fact or applications of law. Section 27A(b) is more general in operation that the law at issue in *Robertson* v. *Seattle Audubon Society*, *supra*, which was directed at only two pending cases. The Court's holding in *Robertson*, 112 S. Ct. at 1414—that when Congress "amend[s] applicable law," its action does not implicate the principles underlying *Klein*—applies here as well. The court of appeals itself recognized that its objection to Section 27A(b) was that it "forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way." Pet. App. 21a n.14.

2. Nor does Section 27A(b) have "practical consequences" that raise constitutional difficulties "in light of the larger concerns that underlie Article III." *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 857. The Constitution does not generally address the nature and degree of finality that a federal judgment will have.[13] It might be suggested that an Act of Congress totally abrogating the finality of all federal court judgments would raise Article III concerns. Such a law might be vulnerable to the objection that it undermined the judiciary's institutional mission as a forum for decision of cases and controversies, and, at the same time, it is difficult to imagine a sufficient legislative justification for such a law. Cf. *Schor*, 478 U.S. at 885. Section 27A(b), however, does not work a wholesale aboli-

[13] The Double Jeopardy Clause of the Fifth Amendment, perhaps the Constitution's only specific requirement of finality with respect to a judgment, prevents Congress from requiring multiple trials for the same criminal offense after a defendant's prior acquittal or conviction. Insofar as that provision protects judgments per se, its protection is confined to the criminal sphere. See, *e.g.*, *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). The Full Faith and Credit Clause, Article IV, § 1, requires "every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." *Durfee* v. *Duke*, 375 U.S. 106, 109 (1963). That Clause does not impose independent standards of finality for judgments. And it does not apply to federal judgments at all; those judgments are addressed by 28 U.S.C. 1738. See *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938).

tion of the finality of judgments,[14] and it is supported by a substantial legislative justification.[15]

Section 27A(b) defines a discrete class of cases consisting of securities fraud actions that were deemed timely under pre-*Lampf* limitations law, that were dismissed as untimely solely on the basis of

[14] Nor does it abolish the common-law principle of res judicata that a final judgment is generally not subject to reopening based on subsequent judicial decisions. See *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981).

[15] This Court has described res judicata as a "common-law doctrine[ ]," and has stated that "[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107-108 (1991); see also *Williams* v. *Amroyd*, 11 U.S. (7 Cranch) 423, 433-434 (1813). Moreover, there are contexts in which federal courts themselves have found that res judicata principles have no force in protecting judgments. See *McCleskey* v. *Zant*, 499 U.S. 467, 479-488 (1991); *Sanders* v. *United States*, 373 U.S. 1, 7 (1963) ("[a]t common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*"; applying that principle under 28 U.S.C. 2255); see also *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (Congress delegated to the Sentencing Commission the power "to decide whether and to what extent its amendments reducing sentences [presumably covered by valid final judgments] will be given retroactive effect"). Whether or not any constitutional problems would be raised by a total abolition of res judicata in the ongoing adjudication of cases in the federal judicial system, the limited effect on finality occasioned by Section 27A(b) does not raise such problems. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 852 (while "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties" under Article III, the Court will not require an "absolute prohibition * * * out of fear of where some hypothetical 'slippery slope' may deposit us").

Lampf, and that went to final judgment because the plaintiffs did not file "meritless and indeed sanctionable" appeals. Pet. App. 5a. Congress's determination that those plaintiffs should have an opportunity to litigate the merits of their complaints in federal court impairs neither the "independent" judiciary nor the right of litigants to a judge free from "potential domination by other branches of government." *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 848. This is true whether Section 27A(b) is regarded as a modification of procedure or as the creation of new substantive rights.

a. As a matter of procedure, Congress's provision for the reopening of certain judgments because of a change in the limitations period is a small variation on current practice. Rule 60(b) of the Federal Rules of Civil Procedure embodies longstanding principles providing for the setting aside of the final judgment of a federal district court in appropriate circumstances. See 7 James Wm. Moore, *Moore's Federal Practice* ¶¶ 60.09-60.27, at 60-65 to 60-306 (2d ed. 1993); see also page 36, *infra*. While Rule 60(b) was adopted by this Court (pursuant to 28 U.S.C. 2072-2074), Article III does not bar Congress from identifying additional circumstances requiring reopening of a judgment when, in Congress's view, considerations akin to those that animated Rule 60(b) and its historical antecedents warrant that relief. "[J]udicial rulemaking" comes within a "twilight area" in the Constitution's allocation of powers among the three Branches, and this Court has long upheld congressional delegations of rulemaking power to federal courts. *Mistretta* v. *United States*, 488 U.S. at 386-387. The promulgation of court rules, however, "is nonjudicial in the sense that rules im-

pose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action." *Id.* at 392. Accordingly, Congress, acting pursuant to its power to establish inferior federal courts (Art. I, § 8, Cl. 9) and the Necessary and Proper Clause (Art. I, § 8, Cl. 18), "has undoubted power to regulate the practice and procedure of federal courts." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825).

When Congress exercises its power to prescribe rules of judicial procedure, Article III does not prevent Congress from requiring, rather than simply permitting, the reopening of a judgment in specified circumstances. Indeed, when the legal standards are settled, Rule 60(b) itself imposes a non-discretionary duty on district courts to reopen particular judgments.[16] A provision requiring the reopening of final judgments in certain in rem actions has also long

[16] See *Printed Media Services, Inc.* v. *Solna Web, Inc.*, 11 F.3d 838, 842-843 (8th Cir. 1993) (judgment void for failure to serve party); *Carimi* v. *Royal Carribean Cruise Line, Inc.*, 959 F.2d 1344 (5th Cir. 1992) (same); *Thos. P. Gonzalez Corp.* v. *Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (default judgment against defendant protected by sovereign immunity); *Hopkins* v. *Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970) (abuse of discretion to deny defendants' Rule 60(b) motion "where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power"); *Pittston Co.* v. *Reeves*, 263 F.2d 328 (7th Cir. 1959) (abuse of discretion to deny motion where dismissal was entered without notice to all members of plaintiff class as required by Fed. R. Civ. P. 23(c)).

been part of federal statutory law.[17] While Congress may not dictate the outcome of a particular case by specifying the facts to be found or by actually applying a legal rule to those facts, it may establish a procedure for the reopening of a judgment for further review within the court system without transgressing any constitutionally grounded concept of finality.

b. As a matter of substance, Section 27A(b) is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations.[18] Such a statute would raise no Article III concerns. See *Pope* v. *United States*, 323 U.S. 1, 9-10 (1944) (rejecting Article III challenge to statute creating new governmental obligation to pay claims, despite prior final judgment rejecting those claims).

[17] See 28 U.S.C. 1655 (providing that defendant who was not personally served (but was served by publication) in an action in rem may, within one year after final judgment, "enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just"); *Perez* v. *Fernandez*, 220 U.S. 224 (1911) (enforcing predecessor of Section 1655 without any suggestion that the statutory mandate that an otherwise final judgment be set aside violates the Constitution). Another example of a legislative reopening provision is contained in the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 520(4).

[18] This Court, in Article III challenges, has often "[l]ook[ed] beyond form to the substance of what [a provision] accomplishes." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985); see also *Pope* v. *United States*, 323 U.S. 1, 9 (1944) (rejecting claim that "inartistically drawn" statute violated Article III, where its "purpose and effect" were permissible).

Congress is free to determine that the interest in having a claim heard and decided on the merits outweighs the equities and practical considerations that normally favor repose. And with the defense of res judicata removed from the case, the courts cannot decline to hear a case by invoking Article III. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980).

In *Sioux Nation*, this Court rejected a separation of powers attack on a statute requiring the Court of Claims to entertain, "without regard to the defense of res judicata," an application by the Sioux Nation for further review of a takings claim that had previously gone to final judgment in favor of the United States. 448 U.S. at 391. The Court explained:

> When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills [takings] claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits.

Id. at 406-407.

Contrary to the view of the court of appeals, the logic of *Sioux Nation* is not limited to cases in which Congress, in the exercise of its power to pay the Nation's debts, waives the res judicata effect of a judgment rejecting a claim against the United States.

Pet. App. 20a, 22a-23a. If res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant or in the exercise of any constitutional power. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 850-851 (parties cannot waive the structural principle of Article III that "prevent[s] the encroachment or aggrandizement of one branch at the expense of the other," because those "limitations serve institutional interests [of the courts] that the parties cannot be expected to protect"). The principles of Article III jurisprudence expressed in *Sioux Nation* are therefore applicable whenever Congress lifts the bar of res judicata in the exercise of a constitutionally granted power, such as the power to regulate commerce that is at issue here. See 15 U.S.C. 78b.

The reasoning of *Sioux Nation* thus establishes that a statute creating "a new legal right" to sue for securities fraud, with an extended statute of limitations, would not infringe the Article III power of the courts to render final judgments. The impact on the judicial system of adjudicating a hypothetical "new cause of action," however, is no different in substance from the impact of Section 27A(b)—except that a statute requiring the filing of new complaints to reinstitute the actions would have been more cumbersome. Because the courts' judicial role is not undermined by a congressional decision to authorize litigation of a "new claim" that was previously concluded by a judgment, Congress's choice to employ the procedural route of providing for reinstatement of a previously dismissed case does not violate Article III.

C. Section 27A(b) Does Not Conflict With The Historical Understanding Or Later Implementation Of Article III

The court of appeals believed that this Nation's experience with legislative usurpation of judicial powers in the eighteenth century leads to an understanding of Article III under which Section 27A(b) is invalid. Pet. App. 7a-10a. The historical underpinnings of Article III, however, do not suggest the existence of an overriding "finality" principle that absolutely precludes Congress from providing for reopening of a judgment for further review under a new legal rule. Nor does the interpretation of *Hayburn's Case* in decisions of this Court suggest the existence of such a principle.

1. The backdrop to the adoption of Article III was the exercise by colonial legislatures of powers that were understood to be judicial in nature. "In 1787 judicial interpretation of the law was often not final even in the decision of cases, it being common practice for the legislature, in the exercise of a species of equity jurisdiction, to reverse decisions of the ordinary courts, to order cases retried or appeals granted, and even to adjudicate controveries itself." Edward S. Corwin, *Court Over Constitution* 13-14 (1938); see Gordon S. Wood, *Creation of the American Republic* 154-155 (1969);[19] *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901) (collecting examples of the 1708-1709 Massachusetts Legislature acting in a judicial capacity in particular cases). Madison singled out for criticism the practice of the Virginia and Pennsylvania legislatures rendering decision in specific cases, at the expense of the prerogatives of the courts. See James Madison, *The Federalist Papers*, No. 48, at 311 (C. Rossiter ed. 1961) (quoting Thomas Jefferson, *Notes on the State of Virginia* 120 (W. Peden ed. 1955); emphasis added by Madison)) (Virginia legislature "*decided rights* which should have been left to *judiciary controversy*"); *id.* at 312 (noting criticism by Council of Censors in Pennsylvania that "cases belonging to the judiciary department frequently [have been] drawn within legislative cognizance and determination").[20] Justice Powell has noted that, before the adoption of the Constitution, the rights of individuals were often determined in particular controversies through "trial by a legislature." *INS* v. *Chadha*, 462 U.S. 919, 961-962 (1983) (Powell, J., concurring). "[T]o prevent the recurrence of such abuses," Justice Powell concluded, "the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* at 962.

The independent Judicial Branch created by the Constitution was intended to free the federal courts from the sort of congressional or executive interference that had undermined pre-constitutional judges.

[19] "The assemblies constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints. They continually tried cases in equity, occasionally extended temporary equity power to some common law court for a select purpose, and often granted appeals, new trials, and other kinds of relief." Gordon S. Wood, *supra*, at 154-155.

[20] Alexander Hamilton also expressed the view that the reversal of a judicial judgment in an individual case was not a proper legislative function. See Alexander Hamilton, *The Federalist Papers*, No. 81, at 484 (C. Rossiter ed. 1961) (emphasis added) ("A legislature, without exceeding its province, cannot reverse a determination once made in a *particular* case; though it may prescribe a new rule for future cases.").

The historical examples that excited the Framers' attention, however, were far more intrusive and quite different from Section 27A(b), because they were indistinguishable from the powers exercised by the courts themselves. Section 27A(b), in contrast to those exercises, does not withdraw a specific case from the courts, require a trial to be conducted before the legislature, or reverse a judicial determination based on a disagreement about the underlying facts or the application of existing law to those facts. The purpose and effect of the provision is to change the law and to permit, notwithstanding a prior judgment, the enforcement of substantive legal rights. Nothing in the history of Article III suggests that the Framers intended to prohibit legislation having that sort of impact on a judgment.

2. Because Section 27A(b) does not threaten the separation of powers principles articulated in *Hayburn's Case*, it is not surprising that none of this Court's decisions applying those principles casts doubt on the constitutionality of Section 27A(b). The statutes at issue in most of those cases, unlike the one in *Hayburn's Case* itself, provided for executive or legislative review of decisions of *non*-Article III tribunals. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1864) (opinion of Chief Justice Taney); *In re Sanborn*, 148 U.S. 222 (1893); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). When presented with disputes arising under such statutes, this Court has regarded the exercise of executive or legislative review (as well as the initial assignment of adjudicatory tasks to non-Article III decisionmakers) as valid, and has held only that the availability of

executive or legislative review precludes judicial review by Article III courts.[21] In other cases applying the logic of *Hayburn's Case*, the Court held that executive or legislative revision was not available at all.[22]

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[21] See *United States* v. *Ferreira*, *supra* (federal court hearing claims for which United States was liable under treaty with Spain, whose decisions were subject to review by Secretary of the Treasury, was not exercising judicial power, and no appeal lay to Supreme Court); *Gordon* v. *United States*, *supra* (Court of Claims judgments, which may be paid only after Secretary of the Treasury estimates the claim, are not the exercise of judicial power); *In re Sanborn*, *supra* (Court of Claims' resolution of facts, rendered on referral from Executive Department and reported back to that Department, is not within class of cases that are by statute subject to Supreme Court review); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 112-114 (federal court may not review administrative order granting or denying application for foreign air route, where the President has final authority to approve or disapprove agency's action). See also *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901) (declining to review Court of Claims decision in light of intervening legislation providing that Congress would not pay the judgment).

[22] *See United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641 (1874) (government could not reduce judicially determined debt by applying, as an offset, an asserted claim that the government possessed, but had failed to assert as a counterclaim); *United States* v. *Waters*, 133 U.S. 208, 213 (1890) (award of counsel fees to district attorney by Court of Claims was "a judicial act of a court of competent jurisdiction, [and] was not subject to the reexamination or reversal of the Attorney General"); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (under statute defining its jurisdiction, Court of Claims, when hearing a tax refund claim, is required to resolve all elements of the claim; it cannot render a judgment subject to later proof of one element to the IRS).

None of those cases has application here. As described above, Section 27A(b) does not authorize review of merits adjudications in securities cases by executive or legislative officials. Nor has any executive or legislative official claimed the right to make such a determination. Unlike a statute that gives final authority to determine the outcome of an individual case to another Branch, Section 27A(b) contemplates final resolution of federal securities claims by the courts. In sum, the limited right conferred by Section 27A(b) to have a final judgment reopened does not violate the separation of powers.

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." There is no foundation to the view that the Due Process Clause prohibits alteration of all interests determined by a judgment, and Congress did not violate the due process rights of securities fraud defendants by providing for the revival of Section 10(b) actions previously held to be time-barred.

A. The Due Process Clause Protects Property Interests, Not "Vested Rights"

1. By its terms, the Due Process Clause speaks of "life," "liberty," and "property," not "vested rights." See *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) ("[T]he word[s] 'vested right' [are] nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution."). While courts occasionally characterize certain interests as "vested rights," see, *e.g.*, *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1499; *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), at most, those rights are a form of "property" for due process purposes. The characterization of property rights as "vested" does not immunize those rights from the normal due process test that applies to legislation that regulates economic rights. See *United States* v. *Locke*, 471 U.S. 84, 104 (1985) ("Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties."). Rather, a finding that a right has "vested" in some sense appears only to be a precondition for application of the Due Process Clause. *Weaver* v. *Graham*, 450 U.S. at 29-30; see *Board of Regents* v. *Roth*, 408 U.S. 564, 576-577 (1972).

The Due Process Clause does not prohibit deprivations of property; it requires only that deprivations be accompanied by "due process of law." In the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related to the public ends of the law. See, *e.g.*, *United States* v. *Carlton*, No. 92-1941 (June 13, 1994); *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2286-2287 (1993); *Usery* v.

Turner Elkhorn Mining Co., 428 U.S. 1 (1976). By the same token, the Due Process Clause does not foreclose legislatures from affecting property interests through retroactive laws. *United States* v. *Carlton, supra*, slip op. 4-5; *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501 ("the *constitutional* impediments to retroactive civil legislation are now modest"). The burden of sustaining retroactive legislation under the Due Process Clause is "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989).

Because retroactive laws can pose "problems of unfairness that are more serious than those posed by prospective legislation," *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992), the Court has employed a "presumption against retroactivity" that "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501; *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. at 1514. But "the test of due process" for the retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose * * * by rational means." *Romein*, 112 S. Ct. at 1112. Retroactive legislation that meets those standards satisfies the Due Process Clause "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16; *Romein*, 112 S. Ct. at 1112; *Sperry*, 493 U.S. at 64-65.

There is no exception to that due process principle for so-called "vested rights" in a judgment. Quite apart from the absence of any constitutional text supporting the claim that rights or interests addressed by a judgment enjoy absolute immunity from retroactive legislation, the claim to special treatment for judgments is analytically unsound. If the expectation interests in enforcing private contracts, see *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985), other property rights, see *United States* v. *Locke*, 471 U.S. at 104-105, or settled rules of the common law, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978), do not impose an absolute barrier to change by legislation, a judgment, which simply confirms rights already reflected in the law, has no greater claim to inviolability. Most retroactive legislation can be said to upset expectation interests. When a legislature imposes monetary liability retroactively, and thereby compels an individual to assume liability that did not exist when the relevant acts occurred, see, *e.g.*, *Usery*, 428 U.S. at 17, the effect on the individual's expectations can be quite dramatic. If that effect is permissible, so too is legislation that retroactively regulates expectation interests arising from a judgment.

Any suggestion that rights "vested" by a final judgment lie beyond the regulatory authority of Congress cannot be squared with this Court's decision in *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). In that case, landlords obtained valid state court judgments of eviction during a gap in the application of federal price control statutes. *Id.* at 101-102. When the price controls were reinstated, federal law made them retroactive and precluded evictions under the prior judgments. *Id.* at 102 n.3. Relying on the theory that "the vested rights, created by the prior

judgments * * *, could not be destroyed by subsequent legislation," the landlords claimed that the new law violated the Due Process Clause. 331 U.S. at 102. This Court rejected the claim that "vested rights" in "valid judgments" were immune from regulation:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. * * * The rights acquired by judgments have no different standing.

Id. at 107. See also *Federal Housing Admin.* v. *Darlington*, 358 U.S. 84, 91 n.6 (1958) (*Fleming* holds that "any 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power").

If rights "vested" in a judgment were made inviolate by the Due Process Clause, Fed. R. Civ. P. 60(b) would be constitutionally suspect. Rule 60(b) sets forth a variety of grounds that justify reopening of otherwise final judgments, and some courts have exercised the reopening power in light of changes in the law. See *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese* v. *LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987). This Court as well has reopened a final judgment, when a change in legal terrain rendered the prior judgment inequitable. See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting second petition for rehearing, filed four Terms after certiorari had been denied, because of a change in decisional law governing eligibility for compensation, and because other victims of the same accident had won compensation awards in other courts). If the Due Process Clause permits those interferences with "vested rights" in a judgment, it also permits reopenings under standards enacted by Congress.

2. Under the due process standards that govern review of economic legislation, Section 27A(b) is constitutional. Section 27A is designed to protect the reliance interests of plaintiffs who filed suit before this Court's decision in *Lampf* and whose actions were timely under the limitations periods in effect in their jurisdictions. Congress acted to prevent the perceived unfairness that would result if the change in the limitations period brought about by *Lampf* were applied "to those cases that were pending at the time that the decision came down." 137 Cong. Rec. S18,623-S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Congress was also concerned about the adverse impact of *Lampf* and *Beam* upon private enforcement of the securities laws.[23] Congress had particular reason to protect those plaintiffs whose suits were rendered untimely by *Lampf* and whose judgments became final only because they refrained from taking appeals that the court of appeals indicated would be "meritless" and "sanctionable." Pet. App. 5a. Those legislative goals are plainly legiti-

[23] See *Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden, Chairman, SEC); *Securities Investors' Legal Rights: Hearings on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breeden); *id.* at 21-24 (Chairman Breeden).

mate ones, and Section 27A(b) is directly tailored to advance them.

At the same time, given the circumstances surrounding the enactment of Section 27A(b), the defendants in those cases cannot plausibly claim that the statute prejudices any legitimate reliance interests on their part. Before this Court's decision in *Lampf*, the law of the Sixth Circuit, where this suit arose, made clear that claims under Section 10(b) of the Exchange Act were governed by state limitations periods. *See, e.g., Carothers* v. *Rice*, 633 F.2d 7, 8-9 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981). Far from disrupting settled expectations concerning the applicable limitations period, Section 27A gives effect to those expectations. When the Court retroactively mandated the application of a "1-and-3" rule in *Lampf* and *Beam*, Congress moved quickly to restore the pre-*Lampf* rule, enacting Section 27A in less than six months and requiring motions for reinstatement to be filed within 60 days. See *United States* v. *Carlton*, *supra*, slip op. 6 ("Congress acted promptly and established only a modest period of retroactivity."). In this case, for example, only a few months passed between the district court's dismissal of the Section 10(b) claims and the enactment of Section 27A. In those circumstances, any potential "reliance" interests created by the dismissal order are insufficient "to establish a constitutional violation." *Carlton*, *supra*, slip op. 7; *Usery*, 428 U.S. at 16.[24]

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[24] Respondents did not invoke the Takings Clause of the Fifth Amendment below, nor was that issue addressed by the court of appeals. As a result, the issue is not properly before this Court. See *Granfinanciera* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). In any event, Section 27A(b) does not "take" any compensable property interest. All that has been "taken" by Section 27A(b) is the "right" fortuitously bestowed on some defendants by *Lampf* and *Beam* not to litigate federal securities claims. The financial burden of litigation is hardly the kind of deprivation that entitles litigants to compensation under the Fifth Amendment. Cf. *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (litigation expenses are not just compensation); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

The Takings Clause would not entitle defendants to compensation by the federal government even if they are found to have violated the federal securities laws and are ultimately required to pay damages. In that event, the damages would be due to fraudulent acts that were illegal when committed and that gave rise to liability under already-existing federal laws. Reimposing liability to injured persons for actions that were tortious and unlawful when taken can hardly constitute a "taking" of "property" within the meaning of the Takings Clause. The object of that provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan* v. *Tigard*, No. 93-518 (June 24, 1994), slip op. 9. There is "no constitutionally compelled reason to require the Treasury to assume the financial burden," *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228 (1986), for the fraud, if any, committed by private defendants.

B. The "Vested Rights" Doctrine, Even If It Has Continuing Significance, Does Not Invalidate Section 27A(b)

As demonstrated above, the Due Process Clause does not create a special category of "vested rights" in judgments that are exempt from congressional regulation. This case provides no justification for recognizing such a doctrine, and even under older precedents of this Court, the "vested rights" claim fails.

1. The claim that "vested rights" in a judgment deserve absolute constitutional protection is at its weakest with respect to the judgment at issue here: a judgment resting on the statute of limitations, rather than an adjudication of the merits of the underlying dispute. Such a judgment does not create or declare any property right in the defendant; it merely protects the defendant from a particular suit.

When a case is dismissed solely because it is time-barred under then-governing law, the dismissal does not necessarily extinguish the underlying claim, which may continue to be asserted. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (final dismissal of claimant's quiet title action against the United States on the ground that the limitations period had expired would not divest the claimant of whatever property rights it possesses, which may be asserted in another proceeding); *Bank of the United States* v. *Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834) ("As the contract, upon which the original suit was brought was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky."). And revival of the cause of action underlying the judgment of dismissal does not impose liability retroactively on a transaction that was lawful at the time. See *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931) (rejecting "vested rights" challenge to curative statute restoring tax liability after statute of limitations had run). Section 27A(b) does not change the rules that prohibited respondents from committing fraud in securities transactions; it merely permits application of those rules notwithstanding the prior judgment, which was entered without reaching the merits. Section 27A(b) therefore does not deprive the defendant of any property interest.

As a general matter, the Due Process Clause does not prohibit legislatures from retroactively reviving claims that have become barred by the running of a statute of limitations. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976); *Campbell* v. *Holt*, 115 U.S. at 628. A judgment that confirmed the running of the former limitation period does not add much to a defendant's due process objection to subsequent legislation that removes the time-bar to suit.

2. Even if this case were analyzed under older precedents that suggest that there is special protection accorded to some interests in a judgment, Section 27A(b) passes constitutional muster. As the court of appeals noted, Pet. App. 14a n.12, this Court stated in *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough*'s application of its "rule" protecting vested rights in a judgment, however, is inconsistent with this Court's decisions, both before and since. The judgment at issue in *McCullough* was that of a trial court; the case was pending on appeal when the state legislature changed the relevant law. Despite the quoted statement in *McCullough*, it is well established that a change in law may be applied to a pending case when the legis-

lature has so indicated with the requisite degree of clarity.[25]

Moreover, this Court has never foreclosed legislative action affecting even a final judgment in the unqualified fashion suggested by *McCullough*. To the contrary, the Court has upheld a wide range of federal and state statutes that have divested litigants of the benefits of final judgments. See, *e.g.*, *Fleming* v. *Rhodes*, *supra*; *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Hodges* v. *Snyder*, 261 U.S. 600, 603-604 (1923); *Stephens* v. *Cherokee Nation*,

[25] In *McCullough*, the Court reviewed a Virginia law that rescinded the right of a bondholder to use coupons to pay state taxes, and instead required taxes to be paid in cash. 172 U.S. at 103-105, 122. The bulk of the Court's opinion sustained the bondholder's claim that the right to use the coupons was protected from state impairment by the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. 172 U.S. at 109-123. The language regarding "rights which have once been vested by a judgment" appears in a section of the opinion that rejected the claim that the bondholder's action had to be dismissed because after the judgment was rendered in the trial court, and the case was on appeal, Virginia repealed the "statute authorizing this particular form of suit." *Id.* at 123. *McCullough*'s statement that the legislature cannot repeal the right to sue while a case is pending on appeal from a judgment conflicts with cases dating from *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110 ("the court must decide [a case] according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside"), to *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501 ("in many situations, a court should apply the law in effect at the time it renders its decision, * * * even though that law was enacted after the events that gave rise to the suit"). The result in *McCullough* can be explained, however, as protecting the bondholder's right to enforce a contract with the State against state impairment in the form of the withdrawal of a remedy.

174 U.S. 445, 477-478 (1899); *Freeland* v. *Williams*, 131 U.S. 405, 417-421 (1889); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855). In particular, this Court has held that the concept of vested rights does not invalidate legislation, like Section 27A(b), that directs the reopening and reexamination of final judgments, even when the legislation is enacted after the judgments have become final and the reexamination requires the application of new rules of law.

In *Freeland*, for example, a land owner obtained a money judgment against a soldier who stole cattle during the Civil War. 131 U.S. at 406. In 1867, the Supreme Court of West Virginia affirmed the judgment, which rejected a defense based on the soldier's status as a belligerent. *Id.* at 407-408. In 1872, before the land owner had executed the judgment, West Virginia amended its constitution to provide that no person "shall be liable in any proceeding, * * * nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered," for military actions that were consistent with "the usages of civilized warfare" during the Civil War. *Id.* at 411.

Invoking the new law, the defendant in *Freeland* brought a bill to enjoin execution of the plaintiff's final judgment. 131 U.S. at 407-409. The plaintiff challenged the constitutionality of the law, raising a "vested right" argument:

> The proposition of the plaintiff * * * is, that by the judgment of the [trial court] he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment * * * is depriving him of property without due process of law * * *. This right of the plain-

> tiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Id. at 417. This Court rejected the vested right claim and sustained West Virginia's power to bar enforcement of the final judgment. *Id.* at 417-421. The Court explained that "[j]udgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties," may constitutionally be "subject[ed] to review, to reconsideration, to reversal and to modification by various modes," such as writs of error and bills of review. *Id.* at 418. The Court further held that the legislature could retroactively "remov[e] objections and obstructions" to such review procedures, even when the "objections and obstructions" consisted of the substantive legal rules that supported the original judgment. *Id.* at 419-420.

In concluding that due process of law allowed the expansion of opportunities to review a judgment, even after the judgment became final, the Court stated in Freeland that "[p]rior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded." 131 U.S. at 420 (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380 (1829); *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222 (1833); *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88 (1834); and *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160 (1864)). *Freeland* concluded that the adoption of the Fourteenth Amendment did not cast doubt on the validity of statutes of that character. 131 U.S. at 420.

In *Stephens*, individuals obtained decrees of Indian citizenship from the United States Court for the Indian Territory in what is now Oklahoma. 174 U.S. at 476. The statute under which the suits were brought provided that "the judgment of the court shall be final." *Ibid.* After the judgments were entered, Congress enacted legislation permitting the losing parties to reopen the judgments by appealing them to this Court. *Id.* at 476-477. The individuals who had prevailed in the trial court attacked the retroactive legislation on the ground, *inter alia*, that it was "destructive of vested rights." *Id.* at 477. Citing *Freeland*, this Court summarily rejected that contention, stating that "the grant of a new remedy by way of review has been often sustained under particular circumstances." *Id.* at 478. The court dismissed the vested rights claim as inapposite where "the right asserted to be vested is only the exemption of the[] judgments from review." *Ibid.*

The Court applied the same principles again in *Paramino*. There, a federal agency issued an administrative judgment affording only limited compensation to a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act. 309 U.S. at 374-375. The longshoreman did not seek review of the judgment, which by statute became final after 30 days. *Id.* at 375. Five years later, Congress enacted a private bill "ordering the Compensation Commission to review [the] case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards 'to the contrary notwithstanding.'" *Ibid.* The defendant employer argued that the legislation violated the Due Process Clause. 309 U.S. at 377. Relying on *McCullough*, the defendant contended that "[t]he compensation award was a final adjudication vesting property rights" that were "not alterable by subsequent legislation." *Id.* at 372. This Court rejected the invocation of *McCul-*

lough, reasoning that "the immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." *Id.* at 378.

Section 27A(b) plays precisely the same role as the legislation upheld in *Freeland*, *Stephens*, and *Paramino*. In this case and others governed by Section 27A(b), the losing party failed to seek review of an adverse judgment within a statutory time limit imposed by the legislature, and the judgment became final as a result. Congress thereafter enacted legislation providing for further review by the courts, notwithstanding the finality of the original judgment, and it provided for the courts to apply a new rule of law on the limitations issue when doing so. This Court's decisions confirm the constitutionality of Section 27A(b) in each of those respects. They show that no doctrine of vested rights forecloses the legislature from directing review after the statutory time for review has already run and the judgment has become final (*Paramino*), or from retroactively creating a review procedure that did not previously exist (*Stephens*). And they show that the legislature may direct tribunals to reexamine their judgments not only to determine their correctness under the law that existed at the time the judgment was entered, but also to take account of subsequent, retroactive changes in the substantive rules of law (*Freeland*). It is true that *Freeland*, *Stephens*, and *Paramino* did not involve Article III tribunals, but neither did *McCullough* itself, the case said to establish the vested rights doctrine. If vested rights in judgments exist, there is no reason to find that only federal courts can create them.

In sum, Section 27A(b) does nothing that this Court has not already sustained in *Freeland*, *Stephens*, and *Paramino*. Because Section 27A(b) is indistinguishable for due process purposes from the statutes upheld in those cases, the provision meets the requirements of the Due Process Clause regardless of whether this Court treats the vested rights doctrine as a constitutional anachronism or, instead, as an aspect of current due process analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), provides:

(a) *Effect on Pending Causes of Action.*—The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) *Effect on Dismissed Causes of Action.*—Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.